11 USC § 350
11 USC § 523(a)(3)
11 USC § 524(c)
FRBankrP 5010
FRBankrP 9024
reaffirmation

Melkonian v. Onken BAP No. OR-92-1358-ARO
In re Onken, Case No. 390-32497-S7, Adv. No. 91-3567

BAP aff'g DDS 2/12/93 Unpublished

The BAP affirmed the bankruptcy court's order granting judgment on the pleadings in favor of the debtor. The $500 claim by the plaintiff was discharged even though it was not included on the original schedules.

The chapter 7 was closed as a no asset case more than a year before the complaint to determine dischargeability of the debt and the motion to appoint trustee were filed. The deadline to file claims against the estate was never set, so it did not expire. There was no independent basis to determine that the debt was not dischargeable under § 523(a)(2), (4) or (6).

Telephone conversations between the plaintiff and debtor during which the debtor said he intended to repay the debt are not sufficient to meet the requirements of a reaffirmation agreement imposed by § 524.

The bankruptcy judge did not abuse his discretion in refusing to reappoint a trustee. The creditor sought administration of an asset that was listed in the schedules and therefore abandoned when the case was closed. Since the request was filed 18 months after

the case was closed, it was outside the deadline to set aside an order under FRBP 9024.

92-6(10)

NOT FOR PUBLICATION

FILED

FEB 12 1993

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	BAP No. OR-92-1358-ARO
ORRIN R. ONKEN,	BK. No. 390-32497-S7
Debtor.	Adv. No. 91-3567
BRUCE L. MELKONIAN,	
Appellant,	
v.	**M E M O R A N D U M**
ORRIN R. ONKEN,	
Appellee.	

Argued and submitted by Telephonic Conference Call on November 17, 1992 at Pasadena, California

Filed - FEB 12 1993

Appeal from the United States Bankruptcy Court for the District of Oregon

Honorable Donal D. Sullivan, Bankruptcy Judge, Presiding

Before: ASHLAND, RUSSELL, and OLLASON, Bankruptcy Judges.

An unsecured creditor appeals the bankruptcy court's decisions granting judgment on the pleadings in an adversary proceeding and refusing to order the United States Trustee to appoint a Chapter 7 trustee in the reopened bankruptcy case. We affirm.

STATEMENT OF CASE

On May 9, 1990 debtor Orrin Onken, an attorney, filed a Chapter 7 petition pro se. The bankruptcy court entered a discharge of Mr. Onken on August 23, 1990. The bankruptcy was a no asset case. The case was closed on August 28, 1990.

Creditor Bruce L. Melkonian, also an attorney, was not listed as a creditor on Mr. Onken's payment schedules. As a result, in October, 1991 Mr. Melkonian sued Mr. Onken in the District Court of Multnomah County, Oregon for $500. Mr. Onken then moved to reopen the bankruptcy case on November 5, 1991 without a trustee. The motion was allowed on November 7, 1991, but the case was subsequently closed for the second time on November 12, 1991. The bankruptcy judge, however, sent a letter to Mr. Melkonian allowing him until December 13, 1991 to file a complaint to determine whether the debt was dischargeable. As a result, Mr. Melkonian filed an adversary complaint on November 26, 1991.

On February 24, 1992, the court filed its judgment on the pleadings in favor of Mr. Onken. On March 9, 1992, Mr. Melkonian filed a motion to reappoint the trustee. The motion was denied on March 30, 1992 and the case was ordered closed.

/ / /

STANDARDS OF REVIEW

We review the bankruptcy court's granting of a motion for judgment on the pleadings for an abuse of discretion. In re Villegas, 132 B.R. 742, 744 (9th Cir. BAP 1991). Under the abuse of discretion standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1337 (9th Cir. 1985).

STATEMENT OF ISSUES

(1) Whether the court abused its discretion in refusing to hold a trial to determine the factual controversy presented by creditor's adversary complaint.

(2) Whether the court abused its discretion in failing to order the United States Trustee to appoint a Chapter 7 trustee to debtor's reopened case.

DISCUSSION

Mr. Melkonian argues that the bankruptcy court abused its discretion in granting judgment on the pleadings for Mr. Onken in the adversary proceeding to determine the dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(3)(B). This contention is erroneous. The judge did not abuse his discretion. According to Federal Rule of Bankruptcy Procedure 7012(c), any party may move for judgment on the pleadings in an adversary proceeding.

Substantively, the judge correctly explained that 11 U.S.C. § 523(a)(3)(B) requires a separate cause of action under § 523(a)(2),(4), or (6). See In re Bowen, 102 B.R. 752 (9th Cir. BAP 1989) (explaining the jurisdictional issue concerning 11 U.S.C. § 523(a)(3)). After discovering no facts to support a finding of nondischargeability under § 523(a)(2),(4), or (6), the judge held that while "[g]iving plaintiff the benefit of every inference suggested by the pleadings, plaintiff has not alleged sufficient facts to except his claim from the discharge." (Judgment App. 15).

The judge correctly stated in his Memorandum Granting Judgment on the Pleadings that "[p]laintiff has not asserted any facts showing he was prejudiced by defendant's failure to schedule the debt." (Judgment App. 13). Mr. Melkonian alleges that Mr. Onken owes a debt of $500 for expenses while the two men shared office space and that Mr. Onken agreed during phone conversations to the amount of the debt and to begin monthly payments towards the debt. Mr. Melkonian also alleges that Mr. Onken deliberately omitted Mr. Melkonian as a creditor in his schedules and consequently waived any right to amend his petition.

Mr. Melkonian, however, failed to provide evidence that he was prejudiced by the omission of the debt. Assuming the omission was intentional, Mr. Melkonian lost nothing he would have otherwise received if the debt was initially scheduled. As the judge points out, "[t]his was a no asset Chapter 7, so plaintiff did not forgo a dividend from the estate." (Judgment App. 13). Thus, the adage "no harm, no foul" succinctly dismisses the issue.

Furthermore, Mr. Melkonian's allegations that Mr. Onken orally agreed to pay the debt are immaterial. A valid agreement to pay a dischargeable debt must comply with 11 U.S.C. § 524(c). Their alleged phone conversations fail to meet the stringent provisions of this code section. See, Arnold v. Kyrus, 851 F.2d 738 (4th Cir. 1988); In re Stefano, 134 B.R. 824 (Bankr. W.D. Pa. 1991). Consequently, Mr. Melkonian failed to allege sufficient facts to except his claim from discharge. Accordingly, the bankruptcy court committed no clear error of judgment either procedurally or substantively in granting judgment on the pleadings.

Mr. Melkonian also contends that the bankruptcy court abused its discretion when it refused to order the United States Trustee to reappoint a Chapter 7 trustee on March 30, 1992. FRBP 5010 was amended in 1991 on precisely this matter. Previously the rule stated in pertinent part:

> In a Chapter 7 or 13 case a trustee shall be appointed unless the court determines that a trustee is not necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.

(emphasis added). FRBP 5010 now reads:

> In a Chapter 7, 12, or 13 case a trustee shall not be appointed by the United States Trustee unless the court determines that a trust is necessary to protect the interests of creditors and the debtors and the debtor or to insure efficient administration of the case.

(emphasis added). This amendment inverts the statutory requirement from appointing a trustee unless there is cause to not appointing a trustee unless there is cause. This shifts the burden to the moving party to argue that a trustee is necessary.

It is, as a matter of law, within the judge's discretion to determine whether to appoint a trustee. This is harmonious with FRBP 5010's construction and case law which holds that it is within the judge's discretion whether to reopen a case. Wragg v. Federal Land Bank, 317 U.S. 325, 327, 63 S.Ct. 273, 87 L.Ed. 300 (1943); In re Fossey, 119 B.R. 268, 271 (D. Utah. 1990); In re Atkinson, 62 B.R. 678, 679 (Bankr. D. Nev. 1986).

Here, the judge did not abuse his discretion in denying Mr. Melkonian's Motion to Reappoint a Trustee. Mr. Melkonian was attempting to liquidate an asset of the bankruptcy estate that was listed in the original schedules, a 1984 Toyota automobile. Yet, as the judge explained in his Memorandum of Findings Denying Mr. Melkonian's Motion to Reappoint a Trustee, this case was initially closed over 18 months earlier and "[u]nder 11 U.S.C. § 554(c) and § 350, this asset was abandoned upon closing. . . . Any motion to set aside the abandonment would be untimely under FRBP 9024 which refers to FRCP 60." (Court Memo App. 23).

Accordingly, the court correctly denied Mr. Melkonian's motion for the reappointment of a trustee. The automobile was abandoned to the debtor pursuant to the order closing the case over 18 months earlier. A movant must bring a motion to set aside the order within one year according to FRCP 60(b). Therefore, the judge did not commit clear error by failing to order the appointment of a trustee.

In conclusion, the bankruptcy court did not abuse its discretion in granting judgment on the pleadings in the adversary

matter nor in rejecting Mr. Melkonian bid to appoint a Chapter 7 trustee. We affirm.

OFFICE OF THE CLERK
United States Bankruptcy Appellate Panel
of the Ninth Circuit

NOTICE OF ENTRY OF JUDGMENT

A separate Judgment was entered in this case on FEB 12 1993.

Motions for Rehearing

A motion for rehearing may be filed within 10 days after entry of the judgment. (Bankruptcy Rule 8015).

The motion shall be submitted on 8½ by 11 inch paper, shall not exceed 15 pages in length, and shall comply with rules governing service and signature. An original and three copies shall be filed.

A motion for rehearing may toll the time for filing a notice of appeal to the Court of Appeals. See Bankruptcy Rule 8015.

Bill of Costs

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rules of Appellate Procedure 39.

Issuance of the Mandate

The mandate, a certified copy of the judgment addressed to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 21 days after entry of the judgment unless otherwise ordered by the Panel. A timely motion for rehearing will stay issuance of the mandate until 7 days after disposition of the motion, unless otherwise ordered. See Bankruptcy Rule 8017 and Federal Rules of Appellate Procedure 41.

Appeal to Court of Appeals

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $100 filing fee. Checks may be made payable to the U.S. Court of Appeals For The Ninth Circuit. See Federal Rules of Appellate Procedure 4 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

11 USC § 523(a)(3)(B)

Melkonian v. Onken Adv. No. 91-3567-S

In re Onken Case No. 390-32497-S7

2/24/92 DDS Unpublished

After the debtor reopened his chapter 7 to add a creditor to the schedules, the creditor sought a determination that the debt was not dischargeable under §523(a)(3). The court dismissed the complaint because §523(a)(3) does not create a separate exception from discharge, and the creditor alleged no facts to support a finding that the debt was not dischargeable under §523(a)(2), (4) or (6).

P92-6(3)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	Bankruptcy Case No. 390-32497-S7
ORRIN R. ONKEN, Debtor,	Adversary Proceeding No. 91-3567-S
BRUCE L. MELKONIAN, Plaintiff,	MEMORANDUM GRANTING JUDGMENT ON THE PLEADINGS
v.	
ORRIN R. ONKEN, Defendant.	

Defendant's motion for judgment on the pleadings should be granted. The complaint seeks a determination that defendant's debt to plaintiff is not dischargeable under 11 U.S.C. § 523(a)(3)(B) because it was not listed on the original bankruptcy schedules, and plaintiff did not know of the bankruptcy in time to file a dischargeability complaint. Both parties are lawyers.

Section 523(a)(3)(B) does not create a separate exception from discharge merely for the debtor's failure to

P92-6(3)

schedule a creditor. The creditor must also have a cause of action under § 523(a)(2), (4), or (6). Lochrie v. Urbatek (In re Lochrie), 78 Bankr. 257, 259 (Bankr. 9th Cir. 1987). Plaintiff has alleged no facts that would support a finding of nondischargeability under § 523(a)(2), (4), or (6).

Plaintiff has not asserted any facts showing he was prejudiced by defendant's failure to schedule the debt. Even if the failure to list the debt was intentional rather than through oversight, plaintiff has not lost any rights he would otherwise have had. This was a no asset chapter 7, so plaintiff did not forgo a dividend from the estate. Any rights under 11 U.S.C. § 523(a)(3) have not been triggered. In re Bowen, 102 Bankr. 752 (Bankr. 9th Cir. 1989).

The allegations that defendant orally indicated he would pay the debt and that he intentionally omitted the debt are irrelevant. To be valid, an agreement to pay a dischargeable debt must comply with the provisions of § 524(c). There was no valid reaffirmation agreement entered between the parties.

Giving plaintiff the benefit of every inference suggested by the pleadings, plaintiff has not alleged sufficient facts to except his claim from the discharge. Defendant's motion for judgment on the pleadings should be granted. A judgment will be entered declaring the debt of

/ / / /

/ / / /

plaintiff to be discharged.

DATED this 24th day of February, 1992.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Bruce L. Melkonian
Orrin R. Onken